Yap Thiam Choy v Syarikat Pembenaan Fajar Baru (Rembau) Sdn Bhd

HIGH COURT (TEMERLOH) — CIVIL APPEAL NO 12–9 OF 2000
VT SINGHAM JC
20 JULY 2000

Civil Procedure *— Jurisdiction — Sessions court — Application for transfer from Temerloh to Shah Alam — Defendants' place of business and witnesses in Petaling Jaya — Counterclaim filed, whether relevant for purposes of determining forum — Subordinate Courts Act 1948 Third Schedule para 2(1)(b) & (e)*

The appellant/plaintiff had filed an action at the Temerloh Sessions Court against the respondents/defendants. The learned sessions court judge allowed the application of the defendants to transfer the case from the Temerloh Sessions Court to the Petaling Jaya Sessions Court. It was not disputed that the defendants had their place of business in Petaling Jaya and the defendants' witnesses worked in Petaling Jaya while the plaintiff's address was in Temerloh. The defendants relying on para 2(1)(b) and (e) of the Third Schedule to the Subordinate Courts Act 1948 averred that the summons ought to have been filed in the district in which the defendants resided or had his place of business, or for other reasons it was desirable in the interest of justice that the proceedings should be instituted at the Shah Alam Sessions Court. The defendants argued that if the case was heard in Temerloh, the defendants would be forced to incur heavy expenses to bring the witnesses to theTemerloh Sessions Court.

Held, dismissing the appeal:

The plaintiff's address in Temerloh was not a condition or requirement under para 2(1) of the Third Schedule of the Subordinate Courts Act 1948 in order to decide the forum in which the summons ought to be instituted. The fact that the defendants had filed a counterclaim against the plaintiff did not in any way change the position of the plaintiff for the purposes of determining the forum or give effect that para 2(1)(b) was meant for a plaintiff who had received a counterclaim against him. The appeal was dismissed as the defendants had satisfied conditions (b) and (e) of para 2(1) of the Third Schedule to the Subordinate Courts Act 1948 (see p 762C–D, G).

[Bahasa Malaysia summary

Perayu/plaintif telah memfailkan tindakan di Mahkamah Sesyen Temerloh terhadap responden-responden/defendan-defendan. Hakim mahkamah sesyen telah membenarkan permohonan defendan-defendan untuk memindahkan kes dari Mahkamah Sesyen Temerloh ke Mahkamah Sesyen Petaling Jaya. Adalah tidak dipertikaikan bahawa defendan-defendan mempunyai tempat

perniagaan mereka di Petaling Jaya dan saksi-saksi defendan bekerja di Petaling Jaya sementara alamat perayu adalah di Temerloh. Defendan-defendan yang bergantung kepada perenggan 2(1)(b) dan (e) Jadual Ketiga Akta Mahkamah Rendah 1948 menegaskan bahawa saman sepatutnya difailkan di daerah di mana defendan tinggal atau mempunyai tempat perniagaan, atau untuk sebab yang lain, adalah sesuai atas kepentingan keadilan bahawa prosiding dimulakan di Mahkamah Sesyen Shah Alam. Defendan-defendan telah menghujahkan bahawa jika kes didengar di Temerloh, defendan-defendan akan terpaksa menanggung perbelanjaan yang tinggi untuk membawa saksi-saksi ke Mahkamah Sesyen Temerloh.

Diputuskan, menolak rayuan tersebut:

Alamat plaintif di Temerloh bukanlah syarat atau keperluan di bawah perenggan 2(1) Jadual Ketiga Akta Mahkamah Rendah 1948 bagi memutuskan forum di mana saman patut dimulakan. Fakta bahawa defendan-defendan telah memfailkan tuntutan balas terhadap plaintif tidak mengubah dengan apa cara sekalipun kedudukan plaintif bagi tujuan memutuskan forum atau memberi kesan bahawa perenggan 2(1)(b) adalah terpakai terhadap plaintif yang telah menerima tuntutan balas terhadapnya. Rayuan telah ditolak kerana defendan-defendan telah memenuhi keperluan-keperluan (b) dan (e) perenggan 2(1) Jadual Ketiga Akta Mahkamah Rendah 1948 (lihat ms 762C–D, G).]

Notes

For cases on jurisdiction generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2834–3057.

Cases referred to

Chap Thian Holding Sdn Bhd v Unknown Persons (That Squatted on Lot 392, Lot 393, Lot 511, Lot 513, Lot 514 and Lot 1455, Section 4, Bandar Butterworth, Daerah Seberang Perai, Negeri Pulau Pinang) Taiping High Court Originating Summons No 24–52 of 1993 (T) (unreported) (refd)

Khor Seow Kee v Boon Hock Sawmill Sdn Bhd [1993] 4 CLJ 365 (refd)

Malacca Securities Sdn Bhd v Loke Yu [1998] 3 AMR 2501 (refd)

Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd [1998] 2 MLJ 268 (refd)

Tung Lian Enterprise v Poly Trading Co [1993] 4 CLJ 189 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 23(1), (a), (b), (c), (d)

Interpretation Acts 1948 and 1967 s 17A

Subordinate Courts Act 1948 s 99A, Third Schedule's para 2(1)(a), (b), (c), (d), (e)

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CM Lai (*Bahari, Choy & Long Chik*) for the appellant.
Sheron Lee (*Ho & Co*) for the respondents.

VT Singham JC:

B *Appeal*

This is an appeal against the decision of the learned sessions court judge, Temerloh wherein the sessions court judge allowed the application of the respondents or defendants to transfer the case from the Sessions Court Temerloh to the Sessions Court Petaling Jaya.

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Statement of claim

The appellant or plaintiff had filed an action at the Sessions Court Temerloh against the respondents or defendants for breach of contract for failing to settle the sum of RM228,454.77 as of 1 June 1998 for contract
D works carried out for the construction of a Teachers Training College at Besut, Terengganu pursuant to the contract.

Statement of defence

By their statement of defence, the defendants denied the plaintiff's claim
E and pleaded that the plaintiff had abandoned the contract works by completing only 30% of the construction under the agreement and had thereby repudiated the agreement by the breach. Consequently, the defendants were compelled to engage another contractor to complete the contract works which was left incomplete by the plaintiff. The defendants, inter alia, pleaded that as a result of the breach committed by the plaintiff,
F they had incurred loss and thereby counter claimed a sum of RM42,337.10 as special damages, other damages and relief.

Application to transfer proceedings

In the meantime, the defendants filed an application to transfer the
G proceedings from the Sessions Court Temerloh to the Sessions Court Shah Alam and for stay of proceedings until the disposal of the hearing of the application. The learned sessions court judge on hearing the application and reading the affidavits of both the plaintiff and the defendants and upon hearing both the counsels, ordered on 5 May 2000 the proceedings to be transferred from the Sessions Court Temerloh to the Sessions Court
H Petaling Jaya.

Affidavit of defendants

By an affidavit affirmed on 3 November 1999 in support of the application of the transfer of the proceedings to the Sessions Court Shah Alam, the
I director of the defendants' company stated the following grounds:

(a) the plaintiff's action was based on the failure by the defendants to settle the plaintiff the sum of RM228,454.77 for the progress works

carried out and that the previous seven progress payments were paid to the plaintiff's account at Bank Bumiputra Malaysia Bhd, Kapar, Selangor and exhibited the bank-in slips;

(b) since the plaintiff's claim was for the failure to pay the sum of RM228,454.77, the cause of action was within the jurisdiction of the Sessions Court Shah Alam;

(c) the defendants' business address was No 36, Jalan 20/16A, Paramount Garden, Petaling Jaya, Selangor;

(d) the defendants' witnesses who are relevant to the case reside around the area of Petaling Jaya;

(e) it is desirable that the case be transferred to the Sessions Court Shah Alam for hearing; and

(f) the transfer of proceedings to the Sessions Court Shah Alam will expedite the hearing of the case as the defendants' witnesses will freely and easily attend court and this will save costs.

Affidavit of plaintiff

On the other hand, the plaintiff by an affidavit-in-reply affirmed on 2 February 2000 has, inter alia, stated as follows:

(a) the contract works in respect of the civil action were carried out at Besut, Terengganu;

(b) the completion of the contract works was carried out for the construction of Maktab Perguruan Besut, Bukit Keluang, Besut, Terengganu;

(c) by the defendants' counter-claim, the plaintiff has become a defendant in the counter-claim by virtue of the counter-claim, the plaintiff's address as a defendant in the counter-claim is Temerloh;

(d) the statement of account which was sent by the defendants to the plaintiff was addressed to the plaintiff in Temerloh;

(e) the defendants had delayed the filing of the application; and

(f) that the defendants' application for the transfer of proceedings should be dismissed with costs.

Addresses of the parties

Before proceeding to determine this appeal, it is important to note that the plaintiff's address in the statement of claim has been stated as No 30, Kampung Baru, Temerloh whereas the defendants address as No 36, Jalan 20/16A, Paramount Garden, Petaling Jaya, Selangor.

Submission of plaintiff's counsel

At the appeal before this court on 20 July 2000, the plaintiff's counsel submitted as follows:

(a) that the learned sessions court judge had erred when she had ordered the proceedings from the Sessions Court Temerloh to be transferred

A to the Sessions Court Petaling Jaya and repeated his submission based on the grounds as stated in the affidavit of the plaintiff;

(b) as to the issue of jurisdiction, the learned counsel for the plaintiff referred to the case of *Khor Seow Kee v Boon Hock Sawmill Sdn Bhd* [1993] 4 CLJ 365 and to the Third Schedule of the Subordinate Courts Act 1948 (made under s 99A);

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(c) that it is a question of fact, whether the summons should be heard in Sessions Court Temerloh or ought to be transferred to the Sessions Court Petaling Jaya as ordered by the sessions court judge;

(d) the learned counsel for the plaintiff repeated and stressed his point that by virtue of the defendants' claim against the plaintiff, the plaintiff

C has become a defendant whose address is in Temerloh and that being the case, the plaintiff comes within the scope of para 2(1)(b) of the Third Schedule of the Subordinate Courts Act 1948. Therefore, he contended that the summons was rightfully filed at the Sessions Court Temerloh; and

D (e) the order of the learned sessions court judge was wrong because the cause of action and the facts shows that the correct forum should be Besut, Terengganu;

Intervention by the court — At this stage, when the court pointed out to the plaintiff's counsel that it was the plaintiff himself who had filed the

E summons at the Sessions Court Temerloh instead of the Sessions Court Kuala Terengganu, the learned counsel immediately informed the court that he was withdrawing that ground of submission.

(f) urged this court to allow the appeal and to direct that an early date be fixed and that the case proceed at the Sessions Court Temerloh.

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Submission of defendants' counsel

On the other hand, the learned counsel for the defendants submitted, inter alia, as follows, in addition to the grounds contained in the said affidavit of the defendants:

G (a) the summons ought to have been filed in the district in which the defendants reside or has his place of business, or for other reasons it is desirable in the interest of justice that the proceedings should be instituted at the Sessions Court, Shah Alam and relied on para 2(1)(b) and (e) of the Third Schedule of the Subordinate Courts Act 1948;

H (b) that the defendants have their place of business in Petaling Jaya and the defendants' witnesses work in Petaling Jaya and if the case is heard in the Sessions Court Temerloh, the defendants will be forced to incur heavy expenses to bring the witnesses to the Sessions Court Temerloh;

(c) since the previous payments to the plaintiff have been made and paid

I to the account of the plaintiff's bank in Kapar, Selangor and the cause of action of the plaintiff is for the failure to pay the amount, the cause of action arose in the district of Petaling Jaya, in the state of Selangor;

(d) the defendants did not apply to transfer the proceedings to the Sessions Court Petaling Jaya but instead to the Sessions Court Shah Alam as they had received information that the civil cases were not heard in the Sessions Court Petaling Jaya but instead in the Sessions Court Shah Alam;

(e) that at the time when the plaintiff instituted the action and filed the summons against the defendants, there was no counter-claim as yet and the plaintiff had no prior knowledge whether there will be a counter-claim by the defendants, and therefore the fact that the defendants have included the counter-claim against the plaintiff does not change the capacity or position of the plaintiff in the original summons which was instituted against the defendants;

(f) that the fact that the plaintiff has purportedly become a defendant in the counter-claim is insignificant in so far as the Third Schedule of the Act is concerned;

(g) the learned counsel relied on para 2(1)(a), (b) and (e) of the Third Schedule;

(h) in support of her arguments, the learned counsel for the defendants relied on two cases namely *Malacca Securities Sdn Bhd v Loke Yu* [1993] AMR 2501 and *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1998] 2 MLJ 268; and

(i) that the plaintiff's appeal should be dismissed with costs.

Reply of plaintiff's counsel

In reply to the submissions of the defendants' counsel:

(a) the plaintiff's counsel distinguished the facts in *Malacca Securities Sdn Bhd*'s case and said that case was related to the sale of shares and that the transfer of proceedings were in respect of the jurisdiction of the High Court and that case has no application to the appeal before this court. He also referred to the case of *Tung Lian Enterprise v Poly Trading Company* [1993] 4 CLJ 189;

(b) that the defendants had filed the application for the transfer of proceedings only after having filed the statement of defence and the counterclaim. In the circumstances, the position of the plaintiff has changed to that of a defendant and by virtue of that, the plaintiff's address has become the address of that of a defendant in the counter-claim which is Temerloh and this factor ought to be taken into consideration;

(c) it will cause inconvenience and heavy burden on the plaintiff to travel to Petaling Jaya to defend the counterclaim; and

(d) the criteria to decide on the correct forum is not the place where the payment to the plaintiff was made by the defendants but according to the Third Schedule.

Poser by court

As soon as both parties had completed their submissions, this court posed a question as follows:

> Whether para 2(1)(a) to (e) of the Third Schedule of the Subordinate Courts Act 1948 should be read conjunctively or disjunctively?

Both counsels replied that para 2(1)(a) to (e) should be read disjunctively. The plaintiff's counsel, in fact admitted that any one of the conditions as stated in para 2(1)(a) to (e) will suffice to transfer the proceedings.

Whether conjunctively or disjunctively

This court is of the view that the conditions in para 2(1)(a) to (e) of the Third Schedule should be read disjunctively as the word 'or' is stated immediately after every condition stipulated therein. In fact, for the purpose of clarity, it is important to set out the provisions of para 2(1)(a) to (e).

> (1) Power to stay proceedings unless they have been instituted in the District in which —
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> (a) the cause of action arose; [or]
>
> (b) the defendant resides or has his place of business; [or]
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> (c) one of several defendants resides or has his place of business; [or]
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> (d) the facts on which the proceedings are based exist or are alleged to have occurred; or
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> (e) for other reasons it is desirable in the interests of justice that the proceedings should be had.

In this case, conditions (b) and (e) are in favour of the defendants that the proceedings should be heard in Petaling Jaya as ordered by the sessions court judge as the defendants' place of business and the residence of the witnesses are in Petaling Jaya which is not disputed by the plaintiff.

In *Chap Thian Holding Sdn Bhd v Unknown Persons (That Squatted on Lot 392, Lot 393, Lot 511, Lot 513, Lot 514 and Lot 1455, Section 4, Bandar Butterworth, Daerah Seberang Perai, Negeri Pulau Pinang)* Taiping High Court Originating Summons No 24–52 1993 (T) (unreported), his Lordship, Abdul Malik Ishak J dealt with an application to transfer the originating summons from the High Court Taiping to the High Court Penang. In that case, the relevant provision of the law was s 23(1) of the Courts of Judicature Act 1964 ('the CJA') which read as follows:

> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —
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> (a) the cause of action arose; [or]
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> (b) the defendant or one of several defendants resides or has his place of business; [or]
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
>
> (d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court. A

Interpretation of s 23(1) CJA 1964

In interpreting s 23(1) of the CJA, for the purpose of the transfer of proceedings, his Lordship said that the clear and unambiguous wordings of the s 23(1) of the CJA should be given judicial effect. The condition set out in (a) to (d) of s 23(1) of the CJA are to be read disjunctively and, thus, the existence of any one of the conditions would be sufficient to attract the local jurisdiction of any particular High Court. B C

Decision

In the appeal before this court, the plaintiff's address in Temerloh is not a condition or requirement under para 2(1) of the Third Schedule of the Subordinate Courts Act 1948 in order to decide the forum in which the summons ought to be instituted. It is also the view of this court that the fact that the defendants had filed a counter-claim against the plaintiff which was included in the statement of defence does not in any way change the position of the plaintiff for the purposes of determining the forum or give effect that para 2(1)(b) was meant for a plaintiff who has received a counter-claim against him which was included in the statement of defence as a defence to the plaintiff's action. The words in para 2 of the Third Schedule are clear and without any ambiguity and this court must give it a purposive interpretation to those literal words without inserting to cause a different situation or condition as argued by the plaintiff's counsel. D E

Section 17A of the Interpretation Act 1948 and 1967 reads as follows:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object. F

In the circumstances, the appeal is dismissed with costs as the defendants have satisfied conditions (b) and (e) of para 2(1) of the Third Schedule of the Subordinate Courts Act 1948. G

Appeal dismissed.

Reported by Benjamin Yong

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